

Amendment
Serial No. 10/756,418
Attorney Docket No. 021547A

REMARKS

Claims 1-17 are pending in the present application and are rejected.

Applicant's Response to Claim Rejections under 35 U.S.C. §103

Claims 1-5, 8, 12-14 and 17 were rejected under 35 U.S.C. §103(a) as being unpatentable over Ladyjensky (U.S. Patent No. 5,370,828) in view of Nomiyama (U.S. Patent No. 6,776,495).

It is the position of the Office Action that Ladyjensky discloses the invention as claimed, with the exception of the cylindrical synthetic-resin ampoule being movably contained in the flexible container. The Office Action relies on Nomiyama to provide this teaching.

In response, Applicant respectfully submits that Nomiyama is not prior art with respect to these claims. The pending application was filed on January 14, 2004 as a Continuation-in-Part of Application Number 10/305,391. Application Number 10/305,391 was filed on November 27, 2002. It is noted that the subject matter of claims 9-11 corresponds to the new matter filed with the Continuation-in-Part, while the subject matter of claims 1-8 and 12-17 is supported by the original disclosure of Application Number 10/305,391.

Thus, all of claims 1-5, 8, 12-14 and 17 have an effective U.S. filing date of November 27, 2002. See MPEP §702(V)(B). This date precedes the critical dates of Nomiyama. Nomiyama has a 35 U.S.C. §102(a) date of July 24, 2003 and a 35 U.S.C. §102(e) date of December 11, 2002. Because claims 1-5, 8, 12-14 and 17 have an effective U.S. filing date of November 27, 2002, Nomiyama is not prior art with regard to these claims and cannot be used in

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the rejection. As stated by the Office Action, Ladyjensky does not disclose a cylindrical synthetic-resin ampoule being movably contained in a flexible container. Therefore, the cited art does not disclose all elements recited in the claims, and is insufficient to establish *prima facie* obviousness. Favorable reconsideration is respectfully requested.

Claims 6, 7, 15 and 16 were rejected under 35 U.S.C. §103(a) as being unpatentable over Ladyjensky in view of Nomiyama, and in further view of Noel (U.S. Patent No. 6,021,595).

It is the position of the Office Action that the combination of Ladyjensky and Nomiyama disclose the invention as claimed, with the exception of a hole or hook of the container. The Office Action relies on Noel to provide this teaching.

In response, Applicant respectfully submits that claims 6, 7, 15 and 16 are patentable due to their direct and indirect dependency on claim 1. As discussed above, Nomiyama is not proper prior art with regard to any of claims 1-8 and 12-17. Therefore, the cited art is insufficient to establish *prima facie* obviousness. Favorable reconsideration is respectfully requested.

Claims 9-11 are rejected under 35 U.S.C. §103(a) as being unpatentable over Ladyjensky in view of Blersch (U.S. Patent No. 6,903,262).

It is the position of the Office Action that Ladyjensky teaches the invention as claimed with the exception of a plurality of pinhole-shaped apertures. The Office Action relies on Blersch to provide this teaching. The Office Action states that Blersch discloses "forming a

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plurality of pinhole-shaped apertures for the braking line.” It is noted that none of claims 9-11 refer to a “breaking line.”

This is the same rejection that was made in the Office Action dated November 25, 2006. In the amendment filed on February 27, 2006, Applicant submitted arguments that there was no suggestion or motivation to combine the references and that the references were non-analogous art. However, the pending Office Action contains no comments or remarks of any kind with regard to these arguments.

As noted in at least MPEP 707.07(f), the Examiner is required to answer and address all traversals. This requirement is in addition to any repetition of a previously held position and is required to allow the applicant a chance to review the Examiner’s position as to these arguments and to clarify the record for appeal.

Additionally and as further noted in MPEP 707.07(f), a failure of the Examiner to address the applicant’s traversals can be deemed a failure to rebut these arguments so as to admit that the arguments have overcome the rejection. At the very least, the failure to address the applicant’s traversals would render the Examiner’s decision to again reject the claims arbitrary and capricious and invalid under the Administrative Procedures Act, 5 U.S.C. § 706, the standard under which such rejections are reviewed in view of Dickinson v. Zurko, 527 U.S. 150, 50 USPQ2d 1930 (1999).

As such, since the Examiner has not addressed the applicant’s traversals presented in the Amendment of February 27, 2006, it is respectfully requested that the Examiner withdraw the Office Action and issue a new Office Action addressing the Amendment of February 27, 2006.

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For the Examiner's convenience, the relevant remarks from the February 27, 2006 Amendment are reproduced below.

Ladyjensky discloses a chemiluminescent lighting element having V-shaped serrations 5 formed in the inner tube 2. This inner tube 2 contains a first liquid 4 and is disposed within outer tube 1 and liquid 3. Blersch discloses a shielding element for electric components of an electronic circuit. Blersch discloses a printed circuit board 13 with electronic components 25 disposed thereon. These electronic components are covered by cover 12, which acts as an electromagnetic shield. See column 1, lines 51 to 59. According to Figure 6, this cover 12 contains a hole 27 and a plug 28.

In response, Applicant respectfully submits that there is no suggestion or motivation in the art to combine the references. Ladyjensky contains no suggestion or disclosure of substituting pinhole-shaped apertures for the V-shaped serrations. Further, Blersch contains no suggestion or motivation to apply the teaching of a hole in a cover 12, which acts as an electromagnetic shield, to another apparatus. Thus, one having ordinary skill in the art would not have been motivated to combine the teachings of Ladyjensky with the teachings of Blersch.

Additionally, Applicant submits that the rejection is based on an impermissible combination of non-analogous art. Ladyjensky is directed at a chemiluminescent module, while Blersch is directed at a device for electromagnetic shielding.

The determination that a reference is from a nonanalogous art is therefore twofold. First, we decide if the reference is within the field of the inventor's endeavor. If it is not, we proceed to determine whether the reference is reasonably pertinent to the particular problem with which the inventor was involved. *In re Wood*, 599 F.2d 1032, 202 USPQ 171 (CCPA 1979).

First, an electromagnetic shielding device is clearly not within the field of the inventor's endeavor, which is chemiluminescent devices. Secondly, the reference is not pertinent to the problem with which the inventor was involved. That is, the efficient mixing of chemically active fluids in order to create a chemiluminescent effect. Blersch discloses that the hole 27 is utilized in order to aid in the tearing open of the cover 12. See for instance, column 3, lines 1-17 and column 4, line 57 to column 5, line 4. This tearing open has no relevance to the mixing of chemically active liquids.

In summary, Applicant respectfully submits that there is no suggestion or motivation in the art to combine the teachings of Ladyjensky with the teachings of Blersch. Furthermore, Applicant submits that these references are nonanalogous art and therefore should not be combined. Applicant respectfully traverses the rejection. Favorable reconsideration is respectfully requested.

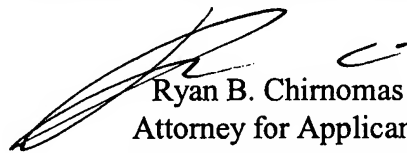
For at least the foregoing reasons, the claimed invention distinguishes over the cited art and defines patentable subject matter. Favorable reconsideration is earnestly solicited.

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Should the Examiner deem that any further action by applicant would be desirable to place the application in condition for allowance, the Examiner is encouraged to telephone applicant's undersigned agent.

If this paper is not timely filed, Applicant respectfully petitions for an appropriate extension of time. The fees for such an extension or any other fees that may be due with respect to this paper may be charged to Deposit Account No. 50-2866.

Respectfully submitted,
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